

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY S. HEDGEPATH and DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD, Portsmouth, Va.

*Docket No. 97-2064; Submitted on the Record;
Issued April 21, 1999*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of \$4,065.12; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment.

On October 21, 1992 appellant, a 43-year-old police officer working directing traffic at the employing establishment, was hit by a pick-up truck. His claim was accepted for "[l]aminectomy L4-5" and he received appropriate compensation benefits; thereafter appellant accepted a position as a police officer at a Veterans Hospital. In 1994 appellant was awarded \$50,000.00 from a third-party recovery. The Office, using a third-party recovery worksheet, calculated that, after all disbursements and allowances were made, there was a recovery surplus of \$10,921.82.

By letter dated October 14, 1994, the Office advised appellant, through his representative, that all expenses incurred by appellant as a result of this injury must be set against the surplus, and that he would not be entitled to any workers' compensation benefits until the surplus was exhausted.

By form letter CA1044-0288 dated December 5, 1994, the Office directly advised appellant of the breakdown in distributions of his third-party settlement and noted that he had a remainder surplus of \$10,921.82. This letter stated: "Any additional compensation due in your case will be credited against the remainder of the recovery upon submission of appropriate claim forms. Additional medical expenses will be credited upon presentation of itemized receipts bills for the accepted condition." Attached to the letter was Form EN-1044 which stated that the remainder of \$10,921.82, which appellant kept, is the amount against which the Office would credit any future payments of compensation or medical expenses on account of the same injury. The form further stated that if appellant had not previously received benefits for permanent impairment of a schedule member, he should file a claim on a Form CA-7 so benefits due can be credited.

On September 15, 1995 Dr. J.C.P. Collier, Jr, a Board-certified orthopedic surgeon, opined that appellant had a 12 percent whole body impairment. On August 2, 1996 an Office medical adviser calculated, using information provided by Dr. Collier, that appellant had a five percent permanent impairment of his left lower extremity.

On December 27, 1996 the Office granted appellant a schedule award in the amount of \$4,065.12 for the period May 6 to August 14, 1994, for a five percent permanent impairment of his left lower extremity. The Office mailed appellant a check in that amount.

On January 30, 1997 the Office determined that payment of the schedule award to appellant was in error as he had an offset of \$10,921.82 surplus remaining from his third-party recovery. The error was explained to appellant by telephone call within a reasonable time before he could spend it.

Also on January 30, 1997 the Office determined that appellant was at fault in the overpayment, because, although he did not create it, he knew or should have known, as he was advised by letter dated December 5, 1994, that he was not to be paid any compensation or medical expenses until the surplus offset was exceeded. A preliminary finding that appellant was not without fault in the matter of the overpayment, was made.

A letter explaining the preliminary determination of overpayment and fault was mailed to appellant on January 31, 1997 and was remailed on February 12, 1997. The letter also advised that appellant could request a prerecoupment hearing.

In a modified schedule award notification, letter dated February 21, 1997 the Office advised of a miscalculation in the schedule award of \$774.48, which was being applied to appellant's surplus, and it noted that once appellant repaid the debt of \$4,065.12, the total amount of the award, \$4,809.60, would be credited to his account.

By letter dated March 19, 1997 appellant contested the fault determination, arguing that his claims examiner did not return his telephone calls or voice messages, and he declared that he did not remember receiving information that he was not entitled to a schedule award; he further requested that he be informed if the Office would like to propose a payment plan.

By telephone call on March 21, 1997, appellant confirmed that he had spent the entire amount of the schedule award, and he was advised that a final decision would be forthcoming.

By decision dated March 24, 1997, the Office determined that appellant received an overpayment of \$4,065.12, as he had a \$10,921.82 surplus from a third-party recovery to be offset before he would be entitled to further compensation benefits. It determined that he had been advised, and therefore should have been reasonably aware, that he was not due the payment of \$4,065.12 as he had not offset the third-party surplus of \$10,921.82. The Office found that he was at fault as he kept and cashed the check, to which he knew or should have known that he was not entitled.

The Office requested that appellant repay the amount of the overpayment, and it advised that it could request a salary offset from his present employer, should it not receive payment.

The Board finds that appellant received an overpayment in the amount of \$4,065.12, as he was paid a schedule award when he had a \$10,921.82 surplus from a third-party recovery to offset before he would be entitled to further compensation benefits.

Under 5 U.S.C. § 8132 a claimant is obligated to reimburse the United States out of any third-party recovery for any disbursements made by the United States to the claimant or on the claimant's behalf, except for continuation of pay.¹

Where there is a recovery surplus, all expenses incurred by appellant as a result of this injury must be set against that surplus, such that he would not be entitled to any workers' compensation benefits until the surplus was exhausted. A schedule award constitutes a disbursement of workers' compensation benefits, to which appellant was not entitled until his recovery surplus was exhausted, and for which the Office is entitled to reimbursement. Therefore, the payment to appellant of the schedule award constituted an overpayment of compensation.

The Board further finds that appellant was not without fault in the matter of the overpayment, such that he was not entitled to waiver.

Section 8129 of the Federal Employees' Compensation Act² provides that an overpayment of compensation shall be recovered by the Office unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

Section 10.320 of the implementing federal regulations³ provides the following:

"In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and mental condition. An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or

¹ See 5 U.S.C. § 8132; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Subrogation and Other Remedies*, Chapter 2.1100.16 (January 1990).

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.1 *et seq.*

(3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”

The Board notes that by letters dated October 14 and December 5, 1994 appellant had been advised that he had a \$10,921.82 surplus from his third-party recovery to offset before he would be entitled to further compensation benefits. The Board, therefore, finds that the third instant applies in this case, and that appellant knew or should have been expected to know that he was not entitled to receive and keep a schedule award payment. However, appellant received and kept the \$4,065.12 payment. On that basis, the Board finds that he was not without fault in the matter of the overpayment and therefore is not now entitled to waiver.

The Board does not have jurisdiction over the manner of recovery of overpayments from recipients no longer receiving compensation payments.⁴

Accordingly, the decision of the Office of Workers’ Compensation Programs dated March 24, 1997 is hereby affirmed.

Dated, Washington, D.C.
April 21, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ See *Robert S. Luciano*, 47 ECAB 793 (1996); *Lewis George*, 45 ECAB 144 (1993) (The Board’s jurisdiction on appeal is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act).